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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

JENNY LISETTE FLORES, *et al.*,

Plaintiffs,

v.

WILLIAM BARR, Attorney General, *et al.*,

Defendants.

Case No. CV 85-4544-DMG (AGRx)

OPPOSITION TO MOTION IN THE  
ALTERNATIVE TO TERMINATE THE  
FLORES SETTLEMENT AGREEMENT  
(DOC. #639)

Hearing: September 27, 2019  
Time: 9:30 a.m.  
Room: 1st St. Courthouse  
Courtroom 8C

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**I. INTRODUCTION**

Defendants again seek to “light a match”<sup>1</sup> to the *Flores* Settlement separate and apart from promulgating final regulations that breach Settlement ¶ 9. Motion in the Alternative to Terminate the *Flores* Settlement Agreement (Doc. #639) (“Motion to Terminate”). Defendants’ motion presents a dizzying array of arguments and quasi-arguments, almost all of which this Court and the Ninth Circuit have previously rejected.

First, this Court and the Ninth Circuit have already held that the Settlement was intended to protect accompanied minors, and the government’s argument to the contrary is precluded. Motion to Terminate at 21 (“The custody and care of family units was not addressed by the parties in the *Flores* Settlement Agreement . . . .”); *contra, Flores v. Johnson*, 212 F. Supp. 3d 864, 872 (C.D. Cal. 2015) (“the plain language of the Agreement is clear that accompanied minors are part of the class . . . .”), *aff’d in relevant part, Flores v. Lynch*, 828 F.3d 898, 905 (9th Cir. 2016) (“We agree with the district court that ‘[t]he plain language of the Agreement clearly encompasses accompanied minors.’”).

Second, Defendants are incorrect that the HSA and TVPRA “should have terminated the Agreement in 2008....” Motion to Terminate at 54. This Court and the Ninth Circuit have already held that the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (“HSA”), and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235 (*codified in principal part at* 8 U.S.C. § 1232) (“TVPRA”) do not supersede the Settlement. *Flores v. Johnson*, 212 F. Supp. 3d at 885 (“ . . . Defendants have not met their burden of showing that a significant change in the law, such that complying with the Agreement would be impermissible, has occurred . . . .”); *Flores*

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<sup>1</sup> Order Denying Defendants’ “Ex Parte Application for Limited Relief From Settlement Agreement,” July 9, 2019 (Doc. #455) (“Ex Parte Order”) at 3.

1 v. *Lynch*, 828 F.3d at 910 (“The government also notes that the Homeland Security  
2 Act of 2002 reassigned the immigration functions of the former INS to DHS; but  
3 there is no reason why that bureaucratic reorganization should prohibit the  
4 government from adhering to the Settlement.”).<sup>2</sup>

5 Third, this Court and the Ninth Circuit have previously rejected the argument  
6 that the Settlement failed to anticipate the current “influx” of class members and  
7 should therefore be set aside. *E.g.*, Motion to Terminate at 51; *contra*, *Flores v.*  
8 *Lynch*, 828 F.3d at 910 (“The Settlement expressly anticipated an influx, and  
9 provided that, if one occurred, the government would be given more time to release  
10 minors or place them in licensed programs.”). Similarly, prior arguments that the  
11 Settlement and this Court’s orders enforcing it are a “magnet” that incite children to  
12 seek asylum in or otherwise enter the United States, *e.g.*, Motion to Terminate at 55  
13 (“the numbers of children crossing the Southwest border continue to rise at an  
14 extraordinary pace in part due to court decisions that create a powerful incentive to  
15 travel with children”), have also been rejected. *Flores v. Johnson*, 212 F. Supp. 3d  
16 at 885-86 (“Defendants also appear to assert not only that the Agreement caused the  
17 surge but also that their female-headed family detention policy has deterred others  
18 who would have come. . . . Defendants do not satisfactorily explain why the

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19  
20 <sup>2</sup> See also *Flores v. Lynch*, 2017 WL 6049373 (C.D. Cal. Jan. 20, 2017), Order re  
21 Plaintiffs’ Motion to Enforce (Doc. #318) (“24A Order”) (“the *Flores* Agreement  
22 remains consistent with federal immigration laws requiring bond hearings for  
23 immigrant detainees, and poses no irreconcilable conflict with the TVPRA’s safety  
24 and placement provisions”); *Flores v. Sessions*, 862 F.3d 863, 880 (9th Cir. 2017)  
25 (“the HSA and TVPRA in fact affirm the broad goals of the *Flores* Settlement”);  
26 Order re Plaintiffs’ Motion to Enforce Class Action Settlement, July 30, 2018 (Doc.  
27 #470) (“July 30 Order”) (“Defendants argue that the TVPRA superseded provisions  
28 of the *Flores* Agreement that govern ORR’s placement of a UAC in a secure  
facility and the review procedures for such placements. . . . These arguments are  
meritless. Moreover, if these arguments have a familiar ring, it is because the Court  
previously rejected Defendants’ similar argument in a slightly different context  
relating to enforcement of Paragraph 24A of the Agreement.”).

1 Agreement, after being in effect since 1997, should only now encourage others to  
2 enter the United States without authorization. Nor do Defendants proffer *any*  
3 competent evidence that ICE’s detention of a subset of class members in secure,  
4 unlicensed facilities has deterred or will deter others from attempting to enter the  
5 United States.”) (emphasis in original).<sup>3</sup>

6 Defendants’ remaining arguments have similarly been rejected. The  
7 argument that the government must indefinitely detain accompanied children in  
8 unlicensed “family residential centers” because no state will license a family  
9 detention center, Motion to Terminate at 24, has previously failed. *E.g., Flores v.*  
10 *Johnson*, 212 F. Supp. 3d at 877 (“The fact that the family residential centers  
11 cannot be licensed by an appropriate state agency simply means that, under the  
12 Agreement, class members cannot be housed in these facilities except as permitted  
13 by the Agreement.”). Finally, the Ninth Circuit has already ruled that Defendants  
14 have waived objection to class certification. *Flores v. Lynch*, 828 F.3d at 908.

15 As this Court has stated, “Defendants’ reheated and repackaged arguments  
16 are improper.” *Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015), Order re  
17 Response to Order to Show Cause (Doc. #189) (“2015 Remedial Order”) at 7, *aff’d*  
18 *in relevant part*, 828 F.3d 898 (9<sup>th</sup> Cir. 2016). Yet even were they previously  
19 unadjudicated, Defendants’ arguments for termination would remain meritless. As  
20 will be seen, Defendants do not and cannot meet the requirements Federal Rule of  
21 Civil Procedure 60(b) posits to modify, much less terminate, the Settlement. The  
22 Court should deny Defendants’ motion and hold that the consent decree continues  
23 to protect vulnerable children against the worst excesses of immigration-related  
24 custody.

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25  
26 <sup>3</sup> See also Order Denying Defendants’ “Ex Parte Application for Limited Relief  
27 From Settlement Agreement,” July 9, 2019 (Doc. #455) (“Ex Parte Order”) at 3 n.2  
28 (“Defendants fail to show that the *Flores* Agreement and the July 24, 2015 Order  
are responsible for the so-called ‘surge’ in illegal family border crossings”).

**II. DEFENDANTS’ REJECTED ARGUMENTS ARE BARRED BY THE LAW OF THE CASE AND LOCAL RULE 7-18.**

“Law of the case” rules have been developed “to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.” 18B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *FEDERAL PRACTICE AND PROCEDURE* § 4478 (2d ed. 2019). The doctrine “is similar to the issue preclusion prong of *res judicata* . . . [but] is concerned with the extent to which law applied in a decision at one stage of litigation becomes the governing principle in later stages of the same litigation.” *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 148 (2d Cir. 1999); *see generally Orantes-Hernandez v. Gonzales*, 504 F. Supp. 2d 825, 836 (C.D. Cal. 2007).

Under the law of the case, a court is bound to honor the rulings of a court that stands higher in the hierarchical judicial structure. *FED. PRACTICE & PROCEDURE* § 4478.<sup>4</sup> “[A]fter the law of the case is determined by a superior court, an inferior court lacks authority to depart from it, and any change must be made by the superior court that established it, or by a court to which it, in turn, owes obedience.” 1B *MOORE’S FEDERAL PRACTICE* ¶ 0.404[1] (2d ed. 1993), at II-2-II-3.<sup>5</sup>

Insofar as this Court’s own rulings are concerned, “when a court decides upon a rule of law, [its own] decision should continue to govern the same issues in

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<sup>4</sup> A trial court must implement both the letter and spirit of the mandate, taking into account the appellate court’s opinion and the circumstances it embraces. *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 14 F.3d 848, 857 (3d Cir. 1994) (quoting *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949 (3d Cir. 1985) (citations omitted)).

<sup>5</sup> If circumstances arise that cast doubt on the correctness of the law of the case as established on appeal, arguments in support of departure must be addressed to the appellate court, either in a petition for rehearing, or if the time for filing a motion for rehearing has passed, by motion for recall of the mandate, or on appeal from the judgment rendered after completion of the proceedings for which the case was remanded. *Id.* at II-60 - II-61.

subsequent stages in the same case.” *Arizona v. California*, 460 U.S. 605, 618 (1983). This principle is formally incorporated in Local Rule 7-18.

Defendants brazenly invite the Court to revisit multiple rulings, including those of the Ninth Circuit, and in effect, turn a blind eye to Local Rule 7-18 and the law of the case doctrine.<sup>6</sup> Defendants’ “reheated and repackaged” arguments, 2015 Remedial Order at 7, should be summarily rejected (again).

**A. This Court should decline to revisit its holding that Defendants may not detain accompanied children indefinitely in unlicensed facilities.**

Prominent among the failed arguments Defendants resurrect to support terminating the Settlement is that “changed circumstances” justify the indefinite detention of accompanied minors, an argument this Court has rejected three times and which the Ninth Circuit rejected as well.

Defendants first argued that ICE should be permitted to detain accompanied minors indefinitely in their opposition to Plaintiffs’ 2015 motion to enforce the Settlement. *See* Defendants’ Response in Opposition to Plaintiffs’ Motion to Enforce Settlement of Class Action, Feb. 27, 2015 (Doc. #121). This Court (1) rejected Defendants’ argument that the Settlement does not apply to accompanied minors; (2) held that a state’s refusing to license a family detention center “simply means that, under the Agreement, class members cannot be housed in these facilities except as permitted by the Agreement”; and (3) held that Defendants’

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<sup>6</sup> Even were this Court’s prior rulings holding Defendants in breach of the Settlement independent actions, res judicata would foreclose Defendants’ repetitive arguments. *See McClain v. Apodaca*, 793 F.2d 1031, 1033 (9th Cir. 1986); *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1529 (9th Cir. 1985) (quoting *Brown v. Felsen*, 442 U.S. 127, 131 (1979)) (It “prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.”).



1 holding family detention centers to their own standards failed to comply with the  
2 Settlement’s *state* licensing requirement. *Flores v. Johnson*, 212 F.Supp. 3d at 869-  
3 79.<sup>7</sup>

4 The Ninth Circuit affirmed, holding that the Settlement applies to  
5 accompanied minors, and rejecting Defendants’ arguments that the Settlement  
6 should be modified due to the surge of family units at the border or enactment of  
7 the HSA and TVPRA. *Flores v. Lynch*, 828 F.3d 898. Defendants filed no petition  
8 for writ of certiorari.

9 In June 2018, Defendants tried again—this time by *ex parte* application  
10 (Doc. #435)—urging the Court to modify the Settlement so that accompanied class  
11 members might be detained indefinitely. The Court again deemed Defendants’  
12 application a “thinly veiled” motion for reconsideration and held that Defendants  
13 had failed to meet the requirements for reconsideration or for modification of the  
14 Settlement. Ex Parte Order at 1, 3-7; *see also Flores v. Lynch*, 828 F.3d at 910  
15 (denying accompanied minors the Settlement’s protections not a “suitably tailored”  
16 response to influx).

17 **B. Defendants offer no reason this Court should reconsider multiple**  
18 **prior rulings that enactment of the HSA and the TVPRA in no**  
19 **way converts continued compliance with the Settlement into an**  
20 **“instrument of wrong.”**

21 Defendants next invite the Court to revisit whether enactment of the HSA  
22 and TVPRA “have rendered some of the substantive terms of the [Settlement] . . .

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23  
24 <sup>7</sup> Shortly thereafter, Defendants again argued that that the Settlement excludes  
25 accompanied minors, this time in response to the Court’s order to show cause re:  
26 remedy. *See* Defendants’ Response to the Court’s Order to Show Cause, etc., Aug.  
27 6, 2015 (Doc. #184). This Court described Defendants’ response as a “thinly-  
28 veiled” motion to reconsider repeating old, failed arguments. 2015 Remedial Order  
at 2, 7. The Court again held that neither changes in the law nor facts merited  
modification of the Settlement. *Id.* at 5-6.

1 outdated or unsuited to current conditions.” 84 Fed. Reg. 44,393; Motion to  
2 Terminate at 53.<sup>8</sup>

3 Again, both this Court and the Ninth Circuit have rejected this reason for  
4 *modifying* the Settlement, a vastly more moderate request than terminating it. *See*,  
5 *e.g.*, *Flores v. Johnson*, 212 F. Supp. 3d at 883-85; *Flores v. Sessions*, 862 F.3d  
6 863, 875 (9th Cir. 2017); 24A Order at 6 (“The Court will not presume Congress  
7 intended to silently abrogate the *Flores* Agreement’s bond hearing provision in the  
8 absence of actual or express language relating to bonds.”). Defendants point to no  
9 change in law subsequent to these rulings that would warrant reconsideration under  
10 Local Rule 7-18 or the law of the case doctrine.<sup>9</sup>

11  
12  
13 <sup>8</sup> Defendants tangentially argue that the Final Rule is an administrative action that  
14 terminates the Settlement pursuant to the HSA’s savings clause regardless of  
15 consistency with the Settlement. Motion to Terminate at 41-42. This argument is  
16 without merit. The HSA’s “savings” provision provides: “Completed administrative  
17 actions of an agency . . . continue in effect according to their terms until amended,  
18 modified, superseded, terminated, set aside, or revoked *in accordance with law* by  
an officer of the United States or a court of competent jurisdiction, or by operation  
of law.” 6 U.S.C. § 552(a)(1) (incorporated by reference into 6 U.S.C. § 279(f)(2))  
(emphasis added).

19 Defendants’ bid to end the Settlement by dint of inconsistent rulemaking is not “in  
20 accordance with law” because such rulemaking itself is an unlawful violation of the  
21 Settlement. *See also State of California, et. al. v. McAleenan*, 19-cv-7390-DMG  
(C.D. Cal. 2019) (alleging that the Final Rule fails to comport with the Due Process  
22 Clause of the Fifth Amendment, is *ultra vires*, and is unlawful under the  
23 Administrative Procedure Act).

24 <sup>9</sup> And although Defendants have not explicitly argued previously that the HSA and  
25 TVPRA wholly supersede the Settlement, they could have so argued against  
26 complying with Settlement ¶ 24A, or any of the other individual provisions of the  
27 Settlement they have sought to evade since 2015. It is too late to do so now. *Cf.*  
28 *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (“Under res judicata, a final judgment on  
the merits of an action precludes the parties or their privies from relitigating issues  
that were or *could have been* raised in that action.” (emphasis added)).

1           **C. Defendants offer no reason to reconsider this Court’s and the**  
2           **Ninth Circuit’s rejection of their “influx” claim.**

3           Defendants also exhume their failed argument that an increase in the number  
4 of children entering their custody justifies termination of the Settlement. Motion to  
5 Terminate at 51-53.

6           Rejecting Defendants’ argument in 2015, this Court held that Settlement ¶ 12  
7 expressly anticipates and accommodates an “influx” of class members. *See* 2015  
8 Remedial Order at 10.<sup>10</sup> The Ninth Circuit affirmed:

9           The government first argues that the Settlement should be modified because  
10 of the surge in family units crossing the Southwest border. “Ordinarily,  
11 however, modification should not be granted where a party relies upon events  
12 that actually were anticipated at the time it entered into a decree.” . . . The  
13 Settlement expressly anticipated an influx, and provided that, if one occurred,  
14 the government would be given more time to release minors or place them in  
15 licensed programs.

16 *Flores v. Lynch*, 828 F.3d at 910 (quoting *Rufo v. Inmates of Suffolk Cty. Jail*, 502  
17 U.S. 367, 385 (1992) (emphasis added) (internal citations omitted)).

18           Obstinacy is not a legitimate reason for this Court to reconsider its prior  
19 rulings. *See Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (motions to alter  
20 or amend a judgment offer an “extraordinary remedy, to be used sparingly in the  
21 interests of finality and conservation of judicial resources.”). Defendants’ motion  
22 should be denied.

23  
24  
25 <sup>10</sup> Again in 2018, Defendants argued that a “worsening influx” of family units at the  
26 Southwest border warranted modification of the Settlement. Ex Parte Application  
27 for Relief from the *Flores* Settlement Agreement, June 21, 2018 (Doc. #435-1), at  
28 12-16. Again the Court rejected Defendants’ argument, holding “it is unnecessary  
to replot the same familiar territory.” Ex Parte Order at 2.



**III. DEFENDANTS’ REGULATIONS NEED NOT “MIRROR” THE SETTLEMENT, BUT  
THEY MUST BE CONSISTENT WITH AND IMPLEMENT IT.**

Defendants next argue that their final rule “relating to the apprehension, processing, care, custody, and release” of class members, 84 Fed. Reg. 44,392 (Aug. 23, 2019) (the “Final Rule”) need not incorporate the Settlement verbatim in order to trigger the agreement’s sunset clause. *See* Motion to Terminate at 2-3. Plaintiffs have never argued otherwise, but the Settlement clearly requires that the Final Rule implement the Settlement in good faith. It does not.

As Plaintiffs explained in their motion to enforce, Settlement ¶ 40, as modified, provides that the agreement shall remain in force until 45 days after Defendants “publi[sh] final regulations *implementing*” the Settlement. Settlement ¶ 40, Stipulation ¶ 1 (emphasis added). The Settlement further provides that the final regulations “shall not be inconsistent with the terms of this Agreement.” Settlement ¶ 9.

Defendants nonsensically argue that even inconsistent regulations that strip children of the Settlement’s crucial protections suffice to trigger the Agreement’s sunset clause. Motion to Terminate at 3. In effect, Defendants would reduce the Settlement’s requiring that regulations implement and not be inconsistent with the agreement to mere surplusage. Defendants offer no authority for such a construction, nor could they.<sup>11</sup>

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<sup>11</sup> As explained in Plaintiffs’ Motion to Enforce, “implement” means to “carry out, accomplish; especially: to give practical effect to and ensure of actual fulfillment by concrete measures.” Merriam-Webster Dictionary, *available at* [www.merriam-webster.com/dictionary/implement](http://www.merriam-webster.com/dictionary/implement) (last visited Sept. 8, 2019). That this definition is precisely what the Parties meant appears throughout the Settlement. *See* Stipulation ¶ 2 (parties agree to confer re: “the *implementation* of . . . the settlement agreement.”); Settlement Exhibit 1 ¶ D (“Individual plans [for the care of each minor] shall be implemented . . . .”); Settlement ¶ 9 (licensed placement requirement in ¶ 19 not effective until contracts with facility operators “negotiated and *implemented*”); Settlement ¶ 29 (requiring Defendants to disclose policies and instructions “regarding the *implementation* of this Agreement” and requiring

1 As discussed in Plaintiffs' supplemental memorandum, the Final Rule  
2 transparently does *not* "implement" the Settlement. *See generally* Supplemental  
3 Memorandum in Support of Motion to Enforce Settlement, Aug. 30, 2019 (Doc.  
4 #634) ("Supplemental Memorandum") & Exhibit A.<sup>12</sup> Instead, a litany of conflicts  
5 between the Final Rule and the Settlement strike a mortal blow to crucial rights and  
6 protections the Settlement confers on vulnerable children, a clear violation of  
7 Settlement ¶ 9.

8 Nor does holding Defendants to their commitment to promulgate regulations  
9 that "implement" and are "not[] inconsistent with" the Settlement violate the APA.  
10 The Settlement is a decree Defendants voluntarily entered and itself an exercise of  
11 discretion. *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1127-30  
12 (D.C. Cir. 1983) (distinguishing *Vermont Yankee, Nuclear Power Corp. v. Nat. Res.*  
13 *Def. Council, Inc.*, 435 U.S. 519 (1978), and finding that a consent decree requiring  
14 rulemaking does not impair agency discretion because the decree itself is the work  
15 of the agency).<sup>13</sup>

16  
17 \_\_\_\_\_  
18 Juvenile Coordinator to answer questions regarding "the *implementation* of this  
19 Agreement") (emphasis added).

20 <sup>12</sup> *See also* Brief of *Amici Curiae* the American Academy of Child and Adolescent  
21 Psychiatry et al. at 3-9, Sept. 6, 2019 (Doc. #665).

22 <sup>13</sup> *Ass'n of Nat'l Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151 (D.C. Cir. 1979),  
23 addresses whether the chairman of an agency may be prohibited from participating  
24 in pending rulemaking proceedings because of a speech allegedly showing  
25 prejudice of the issues involved in the rulemaking. Defendants' reliance on that  
26 decision is obviously misplaced.

27 Nor does the Final Rule "easily survive[] facial constitutional scrutiny." Motion to  
28 Terminate at 41. Defendants' dramatic departures from the Settlement protections,  
detailed in Plaintiffs' Supplemental Memorandum, strip a vulnerable population of  
both substantive and procedural constitutional rights. *See Rufo*, 502 U.S. at 391  
(modification "must not create or perpetuate a constitutional violation").

**IV. DEFENDANTS FAIL TO ESTABLISH ANY BASIS FOR TERMINATING THE SETTLEMENT.**

Federal Rule of Civil Procedure 60(b) provides that a court may grant relief from a judgment, order or decree when it has been satisfied, released, or discharged; applying it prospectively is no longer equitable; or for any other reason that justifies relief. To prevail under Rule 60(b), Defendants must carry “the burden of establishing that they have substantially complied with the [decree] or that facts or law have changed so that ‘it is no longer equitable that the judgment should have prospective application.’” *Jeff D. v. Otter*, 643 F.3d 278, 281 (9th Cir. 2011); *see also Rufo v. Inmates of Suffolk County Jail*, 502 U.S. at 383.<sup>14</sup>

In deciding whether to terminate a consent decree, a district court must first “consider ‘the more general goals of the decree,’” and, second, review “defendants’ entire ‘record of compliance’” with it. *Rouser v. White*, 825 F.3d 1076, 1081 (9th Cir. 2016) (internal citations omitted). Where a change in law is the basis for modification, the Government “must establish that the provision it seeks to modify

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<sup>14</sup> Defendants’ primary reliance on *Horne v. Flores*, 557 U.S. 433 (2009), is misplaced. The controlling precedent here is *Rufo*, not *Horne*.

In *Rufo*, the Court reviewed whether a consent decree should be modified based on changed circumstances. 502 U.S. at 393. The Court held that subsequent clarification of “the law will not, in and of itself, provide a basis for modifying a [consent] decree” unless “the parties had based their agreement on a misunderstanding of governing law.” *Id.* at 390. Holding that any change in law “automatically opens the door for relitigation of the merits of every affected consent decree,” the Court reasoned, “would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation.” *Id.* at 389.

*Horne*, in contrast, involved an injunction issued after trial, which the district court was still enforcing several years later without considering whether the state had otherwise remedied the underlying violation in the interim. 557 U.S. at 441-45. No agreement of the parties was at issue in *Horne*, nor, *a fortiori*, the concern for discouraging settlement that animated the Court’s holding in *Rufo*.

1 has become ‘impermissible,’” *Flores v. Sessions*, 862 F.3d at 874 (quoting *Rufo*,  
2 502 U.S. at 383), and that requiring a party to continue complying with the  
3 agreement would “convert it into an ‘*instrument of wrong*.’” *Id.* (emphasis in  
4 original) (quoting *Sys. Fed. No. 91 Ry. Emps. Dep’t. v. Wright*, 364 U.S. 642, 647  
5 (1961)).

6 When a moving party carries its burden of establishing cause for  
7 modification, a court should modify the agreement “no more” than needed “to  
8 resolve the problems created by the change in circumstances.” *Rufo*, 502 U.S. at  
9 391. Defendants fail to meet any of these requirements: they have not substantially  
10 complied with the Settlement; no change in fact or law warrants modification; even  
11 assuming the contrary *arguendo*, terminating the entire Settlement would be  
12 anything but “suitably tailored.” *See id.*<sup>15</sup>

13 **A. Defendants have not substantially complied with the Settlement.**

14 Defendants insist the Final Rule achieves the goals of the Settlement. In  
15 truth, Defendants have crafted the Final Rule to allow them to do what the  
16 Settlement—and multiple orders of this Court—do not.

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17  
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19  
20 <sup>15</sup> Defendants’ inviting the Court to terminate the Settlement “except as to [certain]  
21 specific issues” addressed by the Rule, Motion to Terminate at 15, in effect requests  
22 modification of the Settlement. Inasmuch as Defendants fail to satisfy Rule 60(b)’s  
23 requirements for termination, they likewise fail to meet the requirements for  
24 modification, particularly as to provisions this Court and the Ninth Circuit have  
upheld.

25 If the Final Rule were consistent with the Settlement, whether Defendants  
26 purported to follow it or the Settlement would not matter. But until and unless they  
27 promulgate consistent regulations that implement the Settlement, it remains in  
28 force, and Defendants are obliged to follow the Settlement notwithstanding their  
inconsistent regulations.

1                   **1. The Final Rule eviscerates the Settlement’s fundamental**  
2                   **purposes.**

3           The Ninth Circuit requires district courts to “give ‘[e]xplicit consideration  
4 [to] the goals of [a] decree [.]’” *Rouser v. White*, 825 F.3d at 1081 (citing *Jeff D. v.*  
5 *Otter*, 643 F.3d at 289). Central to this inquiry is “whether the [defendant] has  
6 demonstrated . . . its good-faith commitment to the whole of the court’s decree and  
7 to those provisions of law and the Constitution that were the predicate for judicial  
8 intervention in the first instance.”” *Otter*, 643 F.3d at 288 (quoting *Freeman v. Pitts*,  
9 503 U.S. 467, 491 (1992)).<sup>16</sup> The Final Rule removes any doubt that Defendants  
10 intend to eviscerate the fundamental goals of the Settlement.

11           Defendants disingenuously assert that “Plaintiffs [have] identified very few  
12 substantive provisions of the proposed rule raising concerns in their Motion to  
13 Enforce filed last year.” Motion to Terminate at 3. Plaintiffs have in fact explained  
14 that the Final Rule would fundamentally degrade the treatment and conditions  
15 children in immigration custody experience in multiple respects. *See* Memorandum  
16 in Support of Motion to Enforce Settlement, Nov. 2, 2018 (Doc. #516), at 5-19; and  
17 Supplemental Memorandum at 4-17. The Final Rule would jettison the Settlement’s  
18 fundamental goals of ensuring that children are detained no longer than necessary  
19 and are housed in state-licensed facilities for howsoever long as they must be  
20 detained. The Final Rule brushes aside both goals and thus clearly breaches  
21 Settlement ¶ 9.<sup>17</sup>

22           <sup>16</sup> In *Otter*, the Ninth Circuit found that before vacating the parties’ consent decrees,  
23 there must be “careful attention to their purposes, along with consideration of the  
24 Action Items” Defendants were required to complete. *Id.* at 289. The Court  
25 concluded that “[i]f the purposes of the consent decree[] and the Implementation  
Plan have not been adequately served, the decree[] may not be vacated.” *Id.* at 289.

26           <sup>17</sup> As Plaintiffs have explained, the Final Rule omits the Settlement’s mandatory  
27 language in favor of aspirational declarations about what Defendants purport to do.  
28 *See* Supplemental Memorandum at 14-16. Defendants respond that “a federal  
agency is obliged to abide by the regulations it promulgates.” Motion to Terminate



1 Defendants cite no authority for the proposition that their breaching the  
2 Settlement excuses compliance with their contractual obligations entirely. Not  
3 surprisingly, the law fails to support such bootstrapping. *See, e.g., Hook v. Arizona*  
4 *Dep't of Corrections*, 972 F.2d 1012 (9<sup>th</sup> Cir. 1992) (enjoining prison regulations  
5 inconsistent with consent decree); *Ferrell v. Pierce*, 560 F. Supp. 1344, 1365-71  
6 (N.D. Ill. 1983), *aff'd*, 743 F.2d 454 (7<sup>th</sup> Cir. 1984) (enjoining regulations  
7 inconsistent with consent decree regarding HUD mortgages).

8 **2. Defendants' woeful record of noncompliance forecloses any**  
9 **claim that the Settlement's goals have been met.**

10 Defendants' long record of violating the Settlement precludes any credible  
11 argument that the agreement's goals have been met.

12 In determining whether a decree's goals have been met, courts "evaluate  
13 whether defendants substantially complied with each" of an agreement's terms.  
14 *Rouser*, 825 F.3d at 1081. "Our cases do not treat consent decrees as monolithic  
15 commands with which defendants either comply or not." *Id.* "[D]istinct provisions  
16 of consent decrees are independent obligations, each of which must be satisfied  
17 before there can be a finding of substantial compliance. Accordingly, courts don't  
18 release parties from a consent decree unless they have substantially complied with  
19 *every one* of its provisions." *Id.* (emphasis in original).

20 Defendants make no attempt to demonstrate that they have complied with  
21 each of the Settlement's provisions, nor would any such attempt succeed. A lengthy  
22 list of orders enforcing the Settlement establishes that Defendants have *repeatedly*  
23 violated it.<sup>18</sup>

24 \_\_\_\_\_  
25 at 34. This is incorrect in that permissive language does not create obligations. As  
26 Plaintiffs argued in their Supplemental Memorandum, these changes in language  
27 would allow Defendants to do what the Settlement forbids *without* violating the  
28 Final Rule.

<sup>18</sup> *E.g.*, 24A Order (holding Defendants in breach of Settlement ¶ 24A); *Flores v. Johnson*, 212 F.Supp. 3d 864 (holding Defendants in breach of multiple provisions

1 To the extent some of the Settlement’s goals have been met, it is only  
2 because this Court and the Ninth Circuit have vigilantly enforced it. Defendants’  
3 repeated violations of the Settlement are reason enough to continue the agreement  
4 in force. *See, e.g., Orantes-Hernandez v. Gonzales*, 504 F. Supp. 2d 825, 845 (C.D.  
5 Cal. 2007) (“an enjoined party’s good-faith compliance with a decree figures  
6 prominently in the court’s dissolution inquiry, because it is a proxy for determining  
7 whether the underlying problem has been remedied”); *Bd. of Ed. of Okla. City*  
8 *Public Schs. v. Dowell*, 498 U.S. 237, 249 (1991) (“But in deciding whether to  
9 modify or dissolve a desegregation decree, a school board’s compliance with  
10 previous court orders is obviously relevant.”); *NLRB v. Harris Teeter*  
11 *Supermarkets*, 215 F.3d 32, 36-37 (D.C. Cir. 2000) (indications that defendants had  
12 continued their unfair labor practices counseled against dissolution, since “the  
13 reduction in violation frequency might be a reflection of the effectiveness of the  
14 prospective fine schedule contained in the consent order rather than a result of good  
15 intentions on the company’s part”); *SEC v. Coldicutt*, 258 F.3d 939, 942-43 (9th  
16 Cir. 2001) (examining defendant’s record of compliance with an injunction to  
17 determine whether she might resume violations if injunction dissolved).

18 The Settlement, in short, is the only thing standing between children and  
19 indefinite detention in unlicensed facilities, which is precisely what Defendants’

20 of the Settlement with respect to treatment of accompanied class members); July 30  
21 Order (holding Defendants in breach of multiple Settlement provisions re:  
22 administration of psychotropic drugs and denying class members licensed  
23 placement without adequate cause, among other violations); *Flores v. Sessions*,  
24 2017 WL 6060252 (C.D. Cal. June 27, 2017), Order re Plaintiffs’ Motion to  
25 Enforce and Appoint a Special Monitor (Doc. #363), *appeal dismissed*; *Flores v.*  
26 *Barr*, No. 17-56297, 2019 WL 3820265 (9th Cir. Aug. 15, 2019) (holding  
27 Defendants in breach of Settlement’s requirement to provide children safe and  
28 sanitary conditions in Border Patrol custody); *see also* Brief of Children’s  
Advocacy Organizations as *Amici Curiae* at 18-21, Sept. 4, 2019, Doc. #659  
(describing DHS’s “routine[] violat[ions] [of] child welfare standards by  
mistreating children in its custody”).

1 regulations would require were the Settlement jettisoned. *See* Supplemental  
2 Memorandum at 6-12. Terminating the Settlement would ensure that its goals—  
3 however imperfectly achieved to date—become relics: *i.e.*, that children are  
4 returned to the status quo ante 1997.

5 **B. No change in fact or law justifies terminating the Settlement.**

6 Defendants next argue that facts or law have changed such that it is no longer  
7 equitable for the Settlement to have prospective application. Motion to Terminate at  
8 51-55. Defendants again resurrect an argument this Court and the Ninth Circuit  
9 have rejected while failing to demonstrate that any subsequent change in law or fact  
10 warrants terminating the Settlement.<sup>19</sup>

11 As the Ninth Circuit has previously ruled, “when the basis for modification is  
12 a change in law, the moving party must establish that the provision it seeks to  
13 modify has become *impermissible*.” *Flores v. Sessions*, 862 F.3d at 874 (internal  
14 quotations omitted) (emphasis in original) (quoting *Rufo*, 502 U.S. at 383).  
15 Defendants do not come close to carrying this burden.

16 As discussed above, this Court and the Ninth Circuit have repeatedly rejected  
17 Defendants’ argument that the HSA and TVPRA supersede the Settlement. *Flores*  
18 *v. Johnson*, 212 F. Supp. 3d at 883-5; *Flores v. Lynch*, 828 F.3d at 910; 24A Order;  
19 *Flores v. Sessions*, 862 F.3d at 880-81; July 30 Order at 6-9. This Court and the

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20 <sup>19</sup> Given Defendants’ position that the Settlement sunsets on October 7, Plaintiffs  
21 respectfully request that that this Court issue an order granting Plaintiffs’ Motion to  
22 Enforce as expeditiously as possible. Should the Court choose to defer ruling on  
23 Defendants’ motion to terminate, Plaintiffs request the opportunity to engage in  
24 discovery (1) to explore the basis for Defendants’ assertion that there has been a  
25 change in facts justifying termination of the Settlement and (2) to determine  
26 whether termination of the Settlement would result in any constitutional violations,  
27 given that a termination of a consent decree would be improper if it created or  
28 perpetuated a constitutional violation. *See Rufo*, 502 U.S. at 391 (“a modification  
must not create or perpetuate a constitutional violation”); the same reasoning  
extends to termination of consent decrees.



1 Ninth Circuit have thus foreclosed termination of the Settlement on account of the  
2 HSA and TVPRA.

3 Defendants also assert that the issuance of the Final Rule—which itself  
4 breaches the Settlement—constitutes a change in law justifying termination. Motion  
5 to Terminate at 48-51. It does not. Allowing Defendants to prevail on this self-  
6 serving course of action would make a mockery out of Rule 60 and a bargained-for  
7 decree.<sup>20</sup>

8 Defendants next argue that the Settlement should end because a “dramatic  
9 increase in minors crossing the Southwest border” was “unforeseen by the parties  
10 and unaddressed in the Agreement.” Motion to Terminate at 51-53. Again, this  
11 Court and the Ninth Circuit have held to the contrary. *See Flores v. Lynch*, 828 F.3d  
12 at 910; *Flores v. Johnson*, 212 F. Supp. 3d at 883-85; Ex Parte Order at 2-3 & n.2;  
13 *infra* II.C.<sup>21</sup>

14 Defendants nevertheless (and repeatedly) claim that the “numbers of children  
15 crossing the Southwest border continue to rise at an extraordinary pace in part due

16 <sup>20</sup> Notably, even if the Settlement were to otherwise terminate by publication of  
17 consistent regulations—which the Final Rule is not—the agreement’s requirement  
18 that “the general population of minors” be housed in “facilities that are state-  
19 licensed for the care of dependent minors” would still continue. Settlement ¶ 40;  
20 Stipulation ¶ 1. The Final Rule would allow Defendants to detain accompanied  
21 children in unlicensed facilities indefinitely, in clear violation of an obligation that  
22 would survive the Settlement’s general termination.

23 <sup>21</sup> Fluctuation in the number of arriving minors was hardly unforeseeable when the  
24 Settlement was executed in 1997. Decl. of Susan Martin, ¶¶ 17, 30 (“[T]he  
25 migration of children and family units across the southern US border, though  
26 recently and prominently in US headlines, is fundamentally not a new phenomenon.  
27 . . . The persistence of such patterns of migration – including as overall numbers of  
28 unaccompanied minors and children arriving as part of families have increased or  
decreased – was thus as much the case before and at the time of the *Flores*  
Settlement Agreement as it remains the case now.”). Defendants may not terminate  
the Settlement due to events they anticipated or should have anticipated at the time  
of the Settlement’s execution. *See Rufo*, 502 U.S. at 385.

1 to court decisions that create a powerful incentive to travel with children . . . .”  
2 Motion to Terminate at 55. This Court has twice held to the contrary, characterizing  
3 Defendants’ logic “‘dubious’ and unconvincing.” Ex Parte Order at 2-3 (citation  
4 omitted).<sup>22</sup> As the Court recognized, there is no correlational relationship between  
5 *Flores* court orders and family migration patterns.<sup>23</sup> This finding is affirmed by  
6 academic experts as well as researchers working directly with children and families  
7 in Central America.<sup>24</sup>

8 Defendants accordingly fail to identify *any* new facts warranting termination,  
9 but rather simply reiterate their “influx” argument. That is not enough to warrant  
10

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11 <sup>22</sup>See also Ex Parte Order at 2-3 (“Any number of other factors could have caused  
12 the increase in illegal border crossings, including civil strife, economic degradation,  
13 and fear of death in the migrants’ home countries.”) (internal citations omitted);  
14 *Flores v. Johnson*, 212 F. Supp. 3d at 886 (“Defendants do not satisfactorily  
15 explain why the Agreement, after being in effect since 1997, should only now  
16 encourage others to enter the United States without authorization”).

17 <sup>23</sup> Ex Parte Order at 3 (citing Adam Cox & Ryan Goodman, *Detention of Migrant*  
18 *Families as “Deterrence”: Ethical Flaws & Empirical Doubts*, justsecurity.org  
19 (June 22, 2018), available at [www.justsecurity.org/58354/detention-migrant-](http://www.justsecurity.org/58354/detention-migrant-families-deterrence-ethical-flaws-empirical-doubts)  
20 [families-deterrence-ethical-flaws-empirical-doubts](http://www.justsecurity.org/58354/detention-migrant-families-deterrence-ethical-flaws-empirical-doubts) (“concluding that ‘there’s not  
even a correlational relationship between [the July 24, 2015 Order] and family  
migration,’ and pointing out that the apprehension patterns for accompanied and  
unaccompanied minors after the decision did not differ from one another”)).

21 <sup>24</sup> See Decl. of Tom K. Wong, ¶ 12 (“there was no statistically significant increase  
22 in U.S. Border Patrol apprehensions of families at the southwest border after the  
23 2015 *Flores* ruling. In other words, there is no evidence that the 2015 *Flores* ruling  
increased the number of families arriving at the southwest border.”); Decl. of  
24 Fernando Chang-Muy, ¶ 29 (“In my extensive experience, I have never had reason  
25 to believe that the *Flores* Settlement Agreement and subsequent court orders in the  
*Flores* case have influenced children and families from Central America in their  
26 decision to come to the United States. These children and families are coming to the  
27 United States because their home countries are deeply afflicted by corruption,  
28 crime, violence and poverty. Moreover, few to none of them are even aware of the  
existence of the *Flores* Settlement Agreement.”).

1 reconsideration of their multiple bids to modify the Settlement, much less terminate  
2 it.

3 In any event, Defendants offer *no* evidence that ending the Settlement would  
4 in fact deter would-be asylum-seekers or unauthorized entrants in the slightest. In  
5 2015, this Court “considered in detail the evidence Defendants presented of the  
6 deterrent effect of the detention policy and [found] the evidence distinctly lacking  
7 in scientific rigor.” *Flores v. Johnson*, 212 F. Supp. 3d at 886.<sup>25</sup> The Court’s finding  
8 is wholly consonant with the unanimous conclusions of experts in Central  
9 American migration – there is no credible evidence that detaining children or  
10 families has discouraged or will discourage others from fleeing poverty and  
11 violence in Central America.<sup>26</sup>

12 Finally, even assuming, *arguendo*, the Settlement were somehow to  
13 encourage asylum-seekers, general deterrence would still be a legally impermissible

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14 <sup>25</sup> Because of Defendants’ failure to supply evidence, the Court decided it “need not  
15 rule on the issue of whether deterrence is a lawful criterion for denying release.” *Id.*  
16 at 24, n.11. *See also* Ex Parte Order at 3, n.2 (“Because Defendants fail to show that  
17 the *Flores* Agreement and the July 24, 2015 Order are responsible for the so-called  
18 ‘surge’ in illegal family border crossings, the Court need not address [whether]  
general deterrence is . . . a permissible purpose of civil detention.”).

19 <sup>26</sup> *See* Pls’ Opp. to Motion to Modify at 14 n.14 (Doc. #122) (collecting sources).  
20 *Accord* Decl. of Fernando Chang-Muy, ¶ 27-28, 32 (“When children and families  
21 are fleeing for their lives, all obstacles pale in comparison to abuse, persecution  
22 or certain death. . . . In my experience . . . , neither harsh deterrence practices, nor  
23 the promise of particular legal protections have ever been a factor motivating or  
24 preventing children and families from seeking asylum or other forms of  
25 humanitarian immigration relief. . . terminating the *Flores* Settlement Agreement  
26 and indefinitely detaining families, will not impact migration patterns.”); *see*  
27 *generally* Decl. of Amy Thompson; *Report of the DHS Advisory Committee on*  
28 *Family Residential Centers*, Sept. 30, 2016,  
[www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf](http://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf) (last  
visited Sept. 4, 2019) (“DHS should not use detention for the purpose of deterring  
future family migration or punishing families seeking asylum in the U.S. Any  
contrary policy is unlawful, *and ineffective*.”) (emphasis added).

1 reason to end the Settlement. *See Kansas v. Crane*, 534 U.S. 407, 412 (2002) (civil  
2 detention may not “become a ‘mechanism for retribution or general deterrence’ –  
3 functions properly those of criminal law, not civil commitment”) (quoting *Kansas*  
4 *v. Hendricks*, 521 U.S. 346, 372-73 (1997) (Kennedy, J., concurring)); *see also*  
5 *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 188-91 (D.D.C. 2015) (enjoining ICE from  
6 detaining class members for the purpose of deterring future immigration to the  
7 United States and from considering deterrence of immigration as a factor in such  
8 custody determinations).<sup>27</sup>

9 **C. Termination of the Settlement is not in the public interest.**

10 Defendants finally argue that the Settlement should be terminated “in the  
11 public interest.” Motion to Terminate at 58. As numerous *amici curiae* have shown,  
12 however, the Settlement uniquely provides vital protections to vulnerable children.  
13 *See* Brief of *Amici Curiae* the American Academy of Child and Adolescent  
14 Psychiatry et al. at 9-25 (describing the “devastating impact” the Final Rule will  
15 have on children, including harm to their mental and physical health, educational  
16 development, and parent relationships); Brief of Children’s Advocacy  
17 Organizations as *Amici Curiae* at 15-18 (criticizing the use of standards derived  
18 from correctional, rather than child welfare principles, and discussing the resulting  
19 harm to children). Though they never manage to say so, implicit in Defendants’  
20 argument is that the Settlement stops them from mistreating children for the sake of  
21 improved border control. Reasonable minds may question whether abusing children  
22 is ever “in the public interest.” Defendants’ argument is meritless in any event.

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<sup>27</sup> Detention policies aimed at deterrence are also generally unlawful under  
25 international human rights law. Brief for *Amici Curiae* Human Rights Watch &  
26 Amnesty International in Support of Plaintiffs at 7, Sept. 4, 2019 (Doc. #655)  
27 (“Detention decisions must be based on an individual assessment of ‘necessity.’ . . .  
28 The necessity standard means that detention must be ‘absolutely indispensable’ and  
‘no other measure less onerous exists.’”).

1 First, Defendants argue that the Settlement “threatens the constitutional  
2 separation of powers.” Motion to Terminate at 45. That assertion borders on the  
3 farcical. “The parties voluntarily agreed to the terms of the *Flores* Agreement . . .  
4 The Court did not force the parties into the agreement nor did it draft the  
5 contractual language.” Ex Parte Order at 7.

6 And in Settlement ¶ 37, Defendants *agreed* that the Settlement would be  
7 enforceable in court. Defendants’ histrionics aside, neither the Settlement nor the  
8 judiciary’s enforcing it threaten the Nation’s constitutional order. *See, e.g., Berne*  
9 *Corp. v. Gov’t of Virgin Islands*, 105 Fed. Appx. 324, 331 (3d Cir. 2004) (“we  
10 conclude that the District Court did not exceed its judicial power when it enforced  
11 the Settlement Agreement and ordered the V.I. Government to provide adequate  
12 funding for the purpose of its implementation”).

13 Nor is Defendants’ complaining that the Settlement has been in place through  
14 “four Presidential administrations,” Motion to Terminate at 47, at all compelling.  
15 Defendants could have ended the Settlement years ago if only they had been willing  
16 to promulgate rules that *implement* it. Neither this Court nor Plaintiffs have stood in  
17 their way. Though Defendants would conflate their failure to discharge their  
18 contractual obligations with the public interest, the two are clearly not the same.<sup>28</sup>

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22 <sup>28</sup> The cases Defendants rely on are not to the contrary, if they are even apposite.  
23 *E.g., Nat’l Audubon Society v. Watt*, 678 F.2d 299, 311 (D.C. Cir. 1982) (finding  
24 that the government’s obligations under a stipulation had been discharged and  
25 declining to decide the “difficult and far-reaching constitutional issues” raised);  
26 *Alliance to End Repression v. City of Chicago*, 742 F.2d 1007, 1019 (7th Cir. 1984)  
27 (noting duty of court to enforce consent decree, but finding “any actual . . . threat to  
28 compliance . . . lies in the future”); *Money Store, Inc. v. Harriscorp Fin. Inc.*, 885  
F.2d 369, 373-74 (7th Cir. 1989) (upholding district court’s refusal to modify  
trademark injunction); *Matthews v. Diaz*, 426 U.S. 67 (1976) (challenge to  
constitutionality of legislation setting Medicare eligibility of resident aliens).



**V. DEFENDANTS' ARGUMENTS REGARDING CLASS CERTIFICATION ARE BARRED, IRRELEVANT, AND MERITLESS.**

Defendants, “[w]hile . . . not yet formally moving to decertify the class”, curiously argue that the Settlement should end because “fundamental flaws in the class require terminating the agreement in the public interest.” Motion to Terminate at 56. Defendants fail to explain how their complaints about the class warrant termination under Rule 60 or any other cognizable legal standard. Yet even assuming, *arguendo*, Defendants were seeking decertification, their arguments would be meritless.<sup>29</sup>

**A. Defendants have waived challenge to class certification.**

Defendants simply ignore that the Ninth Circuit has held that “the government waived its ability to challenge the class certification when it settled the case and did not timely appeal the final judgment.” *Flores v. Lynch*, 828 F.3d at 908. Defendants also ignore the plain language of Federal Rule of Civil Procedure 23(c)(1)(C): “An order that grants or denies class certification may be altered or amended *before final judgment*.” (Emphasis added.) The Parties settled this case and the Court entered final judgment thereon more than twenty years ago.<sup>30</sup>

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<sup>29</sup> Defendants’ argument regarding the import of the “bureaucratic reorganization” of the former INS is wholly discredited. *Flores v. Lynch*, 828 F.3d at 910 (“... there is no reason why that bureaucratic reorganization should prohibit the government from adhering to the Settlement”).

<sup>30</sup> Defendants’ decades-late challenge to the class notice and settlement approval procedures are barred for the same reasons. In any event, notice to the class was reasonable: it was posted in the very facilities in which Defendants were detaining class members and followed essentially the same procedure to which the parties have recently stipulated in conjunction with Plaintiffs’ motion for attorneys’ fees (Doc. #607), which the Court approved (Doc. #613). That a fairness hearing may not have been held when no class member objected is neither surprising nor a deficiency because the Court approved the Settlement before the 2003 amendment to Rule 23, which added the fairness hearing requirement.

**B. Plaintiffs easily meet the Rule 23 commonality requirement.**

Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). “[N]ot every question of law or fact must be common to the class; ‘all that Rule 23(a)(2) requires is a single significant question of law or fact.’” *Rodriguez v. Nike Retail Servs., Inc.*, No. 5:14-cv-01508-BLF, 2016 WL 8729923, at \*9 (N.D. Cal. Aug. 19, 2016) (quoting *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013)) (original emphasis omitted); *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) (“[T]he commonality requirements[] asks [sic] us to look only for some shared legal issue or a common core of facts.”).<sup>31</sup>

Given that Plaintiffs are “entitled to only such relief as is explicitly or implicitly authorized by the *Flores* Agreement,” July 30 Order at 3, common questions of law or fact in this case include, at the very least, whether Defendants’ Final Rule strips class members of rights and protections the Settlement confers. Even apart from Defendants’ having stipulated to a *class-wide* settlement, this

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Defendants’ aspersions against class counsel are both irrelevant and unpersuasive. *See generally* Declaration of Peter A. Schey (Defendants themselves release class members to the Casa Libre licensed youth shelter).

<sup>31</sup> The standard is even more liberal in civil rights cases seeking injunctive relief against “a system-wide practice or policy that affects all of the putative class members.” *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005). Such suits “by their very nature often present common questions satisfying Rule 23(a)(2).” 7A Charles A. Wright, Arthur R. Miller, *Federal Practice & Procedure* § 1763 (3d ed. 2018); *see also Rodriguez*, 591 F.3d at 1122-24 (finding commonality satisfied in habeas class action involving challenges to prolonged immigration detention without bond hearing); *Walters v. Reno*, 145 F.3d 1032, 1045-46 (9th Cir. 1998) (finding commonality in case challenging notices of deportation proceedings); *Lucas R. v. Azar*, No. 18-cv-5741-DMG-PLAx, 2018 WL 7200716, at \*13-14 (C.D. Cal. Dec. 27, 2018) (finding commonality requirement satisfied in case challenging ORR policies, practices, and procedures affecting immigrant children).

question, standing alone, would satisfy Rule 23(a)(2)'s permissive standard. *Abdullah*, 731 F.3d at 957; *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 257 (C.D. Cal. 2008) ("Courts have found that a single common issue of law or fact is sufficient . . .") (citations omitted); *Sweet v. Pfizer*, 232 F.R.D. 360, 367 (C.D. Cal. 2005) ("there must only be one single issue common to the proposed class") (internal quotation marks and citation omitted).<sup>32</sup>

**C. The Settlement creates no "tension" with parental rights.**

In a final meritless complaint over class certification, Defendants declare that the Settlement "created and continues to create significant tension with parental rights." Motion to Terminate at 59. This Court has previously dismissed this assertion. Ex Parte Order at 6 ("Given the situation arising from Defendants' earlier family separation policy, detained parents may choose to exercise their *Ms. L* right to reunification or to stand on their children's *Flores* Agreement rights. Defendants may not make this choice for them."). "[P]laintiffs in this case have always *agreed* that detention of the family together is permissible if the parent consents." *Id.* at 6 (internal quotation marks and citation omitted) (brackets and emphasis in original).

No law requires Defendants to detain families indefinitely, *id.* at 5 ("Absolutely nothing prevents Defendants from reconsidering their current blanket policy of family detention . . ."), and research has unequivocally established that detaining families is profoundly harmful to children.<sup>33</sup> Any "tension" with parental

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<sup>32</sup> Of course, numerous other common questions of law and fact persist, including whether Defendants' policies and practices relating to releasing children to sponsors, and whether the conditions of confinement class members are subjected to in Defendants' custody, violate the United States Constitution.

<sup>33</sup> DHS's own advisory committee urges abandoning family detention in all but exceptional circumstances. *See Report of the DHS Advisory Committee on Family Residential Centers* (Sept. 30, 2016), *available at* [www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf](http://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf) (last visited September 12, 2019) ("detention is generally neither appropriate nor necessary for families – . . . detention or the separation of families for purposes of



